Supreme Court of the United States

OCTOBER TERM, 1938.

No. 31.

THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD, PETITIONER,

VS.

WILLIAM F. BOLIN, EDWARD E. BOLIN AND SAMUEL A. BOLIN ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

PETITION FOR REHEARING.

MILES ELLIOTT,
of St. Joseph, Missouri,
Counsel for Respondents.

INDEX

TABLE OF CASES

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 31.

THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD, PETITIONER,

VS.

WILLIAM F. BOLIN, EDWARD E. BOLIN AND SAMUEL A. BOLIN ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

PETITION FOR REHEARING.

Come now the respondents and respectfully pray the court to set aside the judgment and to grant them a rehearing, for the following reasons:

I.

The opinion of the court erroneously holds that in the case of *Trapp* v. *Sovereign Camp of the Woodmen of the World*, 102 Neb. 562, the Supreme Court of Nebraska decided that petitioner never had power under the law of

Nebraska to issue a certificate containing a provision that payments thereon should cease in a specified period.

II.

The opinion erroneously holds that the doctrine of estoppel could not be invoked in the courts of Missouri against the defense of *ultra vires*, where the contract has been fully performed by the other party.

III.

The opinion erroneously holds that it appears from the record in the Trapp case that the issue of estoppel to plead the defense of *ultra vires* was decided by the Supreme Court of Nebraska in that case.

IV.

The opinion erroneously assumes the *Trapp Case, supra*, was a class suit and fails to decide the vital issue of whether that case was, in fact, a class suit.

V.

The opinion erroneously holds, in substance and effect, that a contract between a fraternal beneficiary society and a member can be changed or impaired at will by the society without the consent of the other party to the contract.

Respectfully submitted,

MILES ELLIOTT,

Counsel for Respondents.

SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING.

I.

An examination of the opinion in the Trapp case (Record, page 93) shows that the opinion of the Supreme Court of Nebraska in that case, except for the statement of facts and issues, consisted of only five lines, to-wit:

> "The main questions presented have been determined adversely to plaintiff in the case of *Haner* v. *Grand Lodge A. O. U. W.*, 20280, decided June 15, 1918, and on the authority thereof the judgment of the district court is affirmed."

Haner v. *Grand Lodge A. O. U. W.*, which is the sole basis of the opinion in the Trapp case, merely holds that, under a statute of Nebraska passed in 1897, a bylaw enacted in 1907 by Grand Lodge A. O. U. W. providing that a member on attaining the age of seventy, irrespective of disability, should be entitled to an endowment, was *ultra vires*. Therefore, the decision of the Nebraska court in the Trapp case amounted only to a holding that under the aforesaid statute of Nebraska, passed in 1907, the "payments to cease" provision of the Trapp certificate was *ultra vires* at the time Trapp's suit was decided in 1918. This was far short of a ruling that petitioner "never had power under the law of Nebraska to issue such a certificate," which ruling the opinion in the instant case finds the Supreme Court of Nebraska to have made in the Trapp case.

II.

In holding that the doctrine of estoppel could not be invoked in the courts of Missouri against the de-

fense of *ultra vires* in the case at bar, the opinion strikes down the rights of the courts of each of the several states to determine the public policy of the state with reference to the conduct of litigants in its courts.

While the opinion of the Kansas City Court of Appeals in this case does hold that the "payments to cease" provision of the policy was not *ultra vires* under the law of Nebraska, this ruling was not necessary to the decision and judgment in the case, and, as shown by our brief, there are other independent grounds upon which the case was decided and adequate to support the judgment.

Suppose that the Kansas City Court of Appeals had ruled that this provision of the policy was *ultra vires* under the law of Nebraska at the time the policy was issued. Still, under the law in Missouri, as declared in the decisions of the Missouri Courts, listed on pages 6 and 7 of respondent's brief, petitioner was estopped to plead *ultra vires* as a defense when the contract had been fully performed by the other party. This was purely a question of local law.

Estoppel to plead *ultra vires* does not depend upon whether the act of the corporation, under consideration, was or was not *ultra vires*, but is based upon the proposition that where the contract has been fully performed by the other party it is unconscionable and against the public policy of the state to permit a corporation to plead that its contract was *ultra vires*. Such an estoppel applies without regard to whether the contract was or was not *ultra vires*.

To rule otherwise is to completely destroy and abolish the well-established principle of estoppel to plead *ultra vires*, which has been recognized and declared by this court in the cases cited on page 6 of our brief, as well as in the other cases, and by the courts of most of the states of the Union.

An *ultra vires* contract, fully performed, of a building and loan association, a similar organization, made with

one of its members, is enforceable, even though *ultra vires*.

Eastern Building & Loan Association of Syracuse v. *Bright Williamson*, 189 U. S. 122, 23 S. Ct. 527, l. c. 530.

Undoubtedly, the Missouri courts were within the rights of the state under the Federal Constitution in ruling, as they have, that a Missouri corporation or fraternal insurance association is estopped to plead that its contract was *ultra vires* after the contract has been fully performed by the other party. To hold that the Missouri courts cannot apply this same doctrine to a litigant in those courts, because it happens to have been incorporated in another state, though doing business in Missouri, is to hold that the power of a state over foreign corporations doing business therein is not equal to its power over domestic corporations. Such a ruling conflicts with the decisions of this court in *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Equitable Life* v. *Pettus*, 140 U. S. 226; *New York Life Ins. Co.* v. *Cravens; Northwestern Nat. Life* v. *Riggs*, 203 U. S. 243 (all cited at page 15 of our Brief); and other decisions of this court.

III.

In holding that the Supreme Court of Nebraska in the Trapp case considered the issue of estoppel of petitioner to plead *ultra vires* and that the Supreme Court of Nebraska determined that issue adversely to the plaintiff in that case, the opinion of the court in the case at hand is clearly erroneous.

The petition in the Trapp case alleged that for the purpose of inducing Trapp to become a member of the organization defendant in that case, petitioner here, made certain false and wrongful statements and representations (Record, pages 72, 73). It is true that defendant's answer in that case pleaded *ultra vires*. But, certainly, plaintiff's reply (Record, page 89), did not plead that the defendant

in that case was estopped to plead *ultra vires*. The only plea of estoppel alleged or attempted to be alleged in the reply in the Trapp case was "that by reason of the acts of defendant it is forever estopped from denying the validity of its contract with the plaintiff" (Record, page 89).

The only acts of defendant alleged as a basis of estoppel were false representations in the procurement of the contract—not full performance of the contract by the other party and retention of the benefits by the corporation.

A fair reading of the pleadings in the Trapp case will disclose that there was no plea of estoppel to plead *ultra vires* and will lead to the inescapable conclusion that the only question of estoppel in that case was an estoppel alleged to have arisen by reason of wrongful and false representations by which Trapp was induced to apply for the contract of insurance.

IV.

A vital issue in the present case was whether the Trapp case was a class suit.

Unless the Trapp case was a class suit, it was not binding on the courts of Missouri. In any event, if it was a class suit, it could have been, and yet can be, reviewed and reconsidered by the Nebraska courts in a suit, involving even the same issues, between another plaintiff and the same defendant. If it could be reviewed and reconsidered by the courts of Nebraska in another case, it is not binding on the courts of Missouri in the instant case.

At pages 17 to 21 of our brief, we earnestly undertook to show, and we submit that we did show, that the Trapp case was not a class suit and, therefore, not binding on the courts of Missouri in the present case. The opinion does not discuss or decide that issue and apparently ignores it. In fact, the opinion seems to assume that the Trapp case was a class suit.

This was a vital issue in the case, upon a correct determination of which a proper conclusion necessarily depended.

V.

The ruling that membership in an incorporated beneficiary society subjects to the law of the state of its domicile insurance contracts issued by the society to residents of other states, while it is doing business in such other states, is based upon a fundamental misconception of fraternal beneficiary insurance.

Briefly stated, the origin and basis of fraternal beneficiary insurance is this: A group of persons band themselves together and set up an organization, which they incorporate, having certain elements or features of fraternalism, and through which medium all the members, as a corporation, enter into an insurance contract with each of the individual members. Each of the members agrees to be bound by the constitution, laws and by-laws, then existing or thereafter adopted, as to the management of the affairs of the society, and as to his conduct, etc., but the insurance contract is a separate and independent contract. It may be a contract uniform and common to all the members of the society, or it may be a contract of one kind or character with some members and of another kind or character with other members (which latter is the system under which petitioner operates).

In practically all instances the contract itself provides, in substance, that the premiums or assessments may be changed by the society from time to time, as appears necessary. Certainly, under that provision of the policy, any action of the society, with reference to changing the rate of assessment, is controlled by the law of the state of its domicile. But that flows from the contract itself.

The contract may expressly provide that it can be amended by the society without the consent of the in-

sured. Or, like the policy in the instant case, the contract may merely provide it shall be liable to forfeiture if the insured shall not comply with the constitution, laws and bylaws in effect at the time the contract is made, or which may be thereafter enacted, in which case the provision regarding subsequently enacted laws or bylaws is construed to mean such bylaws as may be thereafter enacted to govern and regulate the conduct and management of the affairs of the society, and to prescribe the duties of the members, but not to change and nullify the contract of insurance entered into with the members.

An examination of *Royal Arcanum* v. *Green*, 237 U. S. 537; *Hartford Life Insurance Co.* v. *Barber*, 245 U. S. 146, and similar decisions of this court, will disclose that those cases deal only with a right or power, such as increasing the rate of assessments, expressly conferred upon the society by the contract of insurance. Those decisions are sound, but they have no applicability to the present case, in which the right or power in question is not one given to the society by the contract of insurance but is a positive and unconditional right of the insured under the contract.

Everything that is said in the opinion as to the effect of membership in a fraternal insurance society may be said, with equal force and applicability, of membership in any mutual insurance company, such as the multitudinous mutual old line companies and the assessment companies. In all those companies the policyholder is both insurer and insured. If the mere fact of membership in a fraternal benefit society subjects all its contracts, wherever issued, to the law of the state of its domicile, then this court cannot consistently hold that contracts of old line mutuals and of assessment companies are not subject to the same rule, for in those companies the insured is likewise a member and, in most of them, legally entitled to a vote and voice in their management.

CONCLUSION.

We hope the court will pardon us in urging upon the court the importance of the decision in this case as a precedent. The rights of thousands upon thousands of policyholders in fraternal beneficiary societies, including petitioner, will be affected by the decision in this case. In addition, the opinion and decision, if allowed to stand, must be taken by the bar and bench as a precedent holding that the courts of a state cannot declare the public policy of the state as to the conduct of litigants in its courts.

The petition for rehearing should be sustained and a rehearing should be granted.

Respectfully submitted,

MILES ELLIOTT,
Counsel for Respondents.

We, the undersigned, counsel for respondents in the above-entitled cause, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Witness our hands this 23rd day of November, 1938.

RAY WEIGHTMAN,
E. H. GIBBENS,
A. F. HARVEY,
L. L. LIVINGOOD,
MILES ELLIOTT,
Counsel for Respondents.

State of Missouri, County of Buchanan, ss.

Miles Elliott, being duly sworn, upon his oath states that he is attorney for, and of counsel for, respondents in the above-entitled cause, and that the foregoing petition for rehearing is presented in good faith and not for delay.

Miles Elliott.

Subscribed and sworn to before me this 23rd day of November, 1938. My commission expires October 1, 1940.

(Seal)

Mary McJunkin,
Notary Public.

SUPREME COURT OF THE UNITED STATES.

No. 11.—October Term, 1938.

The Sovereign Camp of the Woodmen of the World, Petitioner,
vs.
William F. Bolin, Edward E. Bolin and Samuel A. Bolin, et al.

On Writ of Certiorari to Kansas City Court of Appeals of the State of Missouri.

[November 7, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

We granted certiorari because of the claim that the judgment of the court below failed to accord full faith and credit to the public acts, records, and judicial proceedings of the State of Nebraska as required by Article IV, Section 1 of the Constitution.

The petitioner is a fraternal beneficiary association organized under the laws of Nebraska, having a lodge system, a ritualistic form of work, and a representative form of government. It has no capital stock, and transacts its affairs without profit and solely for the mutual benefit of its members and their beneficiaries. It makes provision for the payment of death benefits by assessments upon its members and issues to members certificates assuring payment of such benefits.

In 1895 the petitioner adopted a by-law authorizing the issue of life membership certificates. Under this by-law a member entering the order at an age greater than 55 years was entitled to life membership without the payment of further dues and assessments when the certificate had been outstanding 20 years. In June 1896, while the by-law remained unrepealed, Pleasant Bolin, who was over 55 years of age, joined a Missouri lodge of the petitioner and received a certificate of membership which recited that while in good standing he would be entitled to participate in the beneficial fund to the amount of $2,000 payable to his beneficiaries and to the sum of $100 for paying a monument at his grave. The certificate recited that it was issued subject to all the conditions named in the constitution and laws of the fraternity and was endorsed with the words "Payments to cease after 20 years."

After Bolin's death, the respondents, as beneficiaries, brought suit to recover upon the certificate. The petitioner's answer set

up that Bolin had ceased to pay the required dues and assessments in July 1916, and his certificate had therefore become void; that the by-law making the certificate fully paid after twenty years was *ultra vires* the association and had been so declared by the Supreme Court of Nebraska in a class suit brought by one Trapp, the holder of a certificate similar to that of Bolin; that, under Article IV, Section 1, of the Constitution, full faith and credit must be given by the courts of Missouri to this decision of the Supreme Court of Nebraska. The respondents replied that the contract was made and delivered in Missouri and was to be construed and enforced according to Missouri law; that, at the date of its consummation, the petitioner had no license or authority to transact business in Missouri as a corporation or otherwise, and the certificate was therefore to be considered as issued pursuant to, and governed by, the general insurance laws of Missouri; that Bolin having fully performed in accordance with the terms of the certificate, the petitioner was estopped to plead *ultra vires;* and that in truth the contract was not *ultra vires* the petitioner.

A jury was waived and the case was tried to the court. The respondents proved the issue of the certificate and Bolin's payments for twenty years thereafter. The petitioner proved the adoption of the by-law purporting to authorize the issue of "payments to cease" certificates; and put in evidence an exemplified copy of the record in *Trapp* v. *Sovereign Camp of the Woodmen of the World*, 102 Neb. 562, wherein it was decided that petitioner never had power under the law of Nebraska to issue such a certificate. Judgment went for the respondents. The petitioner appealed to the Supreme Court of Missouri, which remanded the cause to the Kansas City Court of Appeals[1] on the ground that it involved no constitutional question. The latter affirmed the judgment[2] and adhered to its decision on rehearing.[3]

The court below based its decision on the following grounds:

> Under the law of Missouri the certificate was a Missouri contract because it was delivered to Bolin in Missouri and he made his payments there; all issues respecting rights arising out of the contract must, therefore, be adjudicated according to the decisions of the Missouri courts. The question then arises what

[1] Bolin *v.* Sovereign Camp, W. O. W., 339 Mo. 618.

[2] Bolin et al. *v.* Sovereign Camp, W. O. W., — Mo. App., —; 112 S. W. 2d, 582.

[3] Bolin et al. *v.* Sovereign Camp, W. O. W., — Mo. App. —; 112 S. W. 2d, 592.

system of local law is applicable,—that relating to fraternal beneficiary societies or that applicable to old line insurance companies. At the time the contract was made there was no local statute providing for the licensing of foreign fraternal beneficiary societies. Under the decisions of the Missouri courts the petitioner must, therefore, be denied the immunities extended by statute to domestic fraternal beneficiary associations and must be taken to have been doing business in Missouri under the State's general insurance laws, and the certificate must be regarded as a contract of general or old line insurance. This conclusion is not altered by the nature of the society granting the insurance because the character of the insurance, so far as Missouri is concerned, depends on the terms of the contract only. Whatever may be the character of the petitioner in the eye of the Nebraska law it need not have the same character in Missouri. Whether it is a fraternal beneficiary society when sued in Missouri is a question of local law. Even if the issue of the certificate be an *ultra vires* act under the law of Nebraska it does not follow that it is such under the law of Missouri. The contract is not *ultra vires* under the law of Missouri or, if so, the petitioner may not plead *ultra vires* because, in the light of Missouri law, the contract is an insurance contract with an old line insurance company and the petitioner, under Missouri decisions, cannot, in the circumstances disclosed, avail itself of the fact that the contract was in excess of its charter powers.

The court refused to give force or effect to the decision of the Supreme Court of Nebraska in *Trapp* v. *Woodmen, supra*, saying that case did not hold the issue of such a certificate *ultra vires* in the sense that it was prohibited by positive statute; that the contract being a Missouri contract its *ultra vires* character must be adjudged by the local law irrespective of what the courts of the domicile had held; that the respondents in the present case relied on an estoppel of the petitioner to plead *ultra vires*, whereas no such issue was presented or decided in the *Trapp* case.

We hold that the judgment denied full faith and credit to the public acts, records, and judicial proceedings of the State of Nebraska.

First. The beneficiary certificate was not a mere contract to be construed and enforced according to the laws of the state where it was delivered. Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the state of incorporation. Another state, wherein the

certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of the domicile.[4]

Second. The circumstance that at the time the certificate was issued domestic fraternal societies were exempted from the operation of the general insurance law of the state, and no similar exemption was extended to foreign societies, cannot enlarge the statutory and charter powers of such a foreign society. The fundamental error of the court below springs from a misapprehension of the effect to be given to the absence of provisions exempting foreign beneficiary associations from the statutes applicable generally to old line life insurance companies. Missouri has statutes affecting the validity and enforcibility of stipulations inserted in life insurance policies and other statutes dealing with procedure in actions upon such policies. In 1879 a statute was passed authorizing the incorporation of fraternal beneficiary societies and exempting them from the operation of the general laws of the State in respect of insurance companies.[5] An act of 1881 exempted both domestic and foreign societies from the operation of the general insurance laws.[6] This act did not require the registration of foreign associations but accorded them the same exemption as domestic associations. In 1889 the legislature adopted an act revising the statutes dealing with private corporations and therein provided that domestic beneficial societies should not be subject to the general insurance laws of the State, but omitted any reference to foreign associations.[7] It was not until 1897 that foreign beneficiary associations were required, as a condition of doing business within the state, to register and to file annual reports and to designate the Superintendent of the Insurance Department as the person upon whom process might be served. If they complied with the provisions of this statute they were exempted from the operation of the general insurance laws.[8] This act has been carried forward in later revisions and, with changes immaterial to our inquiry, remains in force. From this hiatus in the statutes governing foreign beneficiary associations it resulted that while foreign associations were not forbidden from organizing

[4] Modern Woodmen *v.* Mixer, 267 U. S. 544, 551; Royal Arcanum *v.* Green, 237 U. S. 531, 542.

[5] Act of March 8, 1879; Laws 1879; R. S. 1879, §§ 972, 973.

[6] Act of March 8, 1881; Laws of 1881, p. 87.

[7] Act of May 11, 1889; R. S. 1889, §§ 2823, 2824.

[8] Act of March 16, 1897; R. S. 1899, c. 12, Art. 11, §§ 1408, 1409, 1410.

lodges, obtaining members, and issuing benefit certificates in Missouri, and their certificates so issued were not deemed to be void,[9] certificates issued in the interim between 1889 and 1897 were construed in accordance with, and actions thereon were governed by, the provisions of the general insurance laws.[10] The Missouri courts, however, were apparently not called upon in any of the cases affected by this rule of decision to pass upon the question of the power of such a society, under the law of the state of its incorporation, to write a particular sort of beneficiary certificate;[11] but this court reversed a judgment of the Supreme Court of Missouri which, without reference to the distinction between the rule applicable to domestic and foreign societies, reexamined and refused to give effect to a judgment of the Supreme Court of Connecticut, the court of the domicile, with respect to the powers of a Connecticut association.[12]

The court below was not at liberty to disregard the fundamental law of the petitioner and turn a membership beneficiary certificate into an old line policy to be construed and enforced according to the law of the forum. The decision that the principle of *ultra vires* contracts was to be applied as if the petitioner were a Missouri old line life insurance company was erroneous in the light of the decisions of this court which have uniformly held that the rights of members of such associations are governed by the definition of the society's powers by the courts of its domicile.[13]

Third. The doctrine of estoppel was erroneously invoked to avoid the force and effect of the Nebraska judgment. The court below was of the opinion that, as the petitioner had issued a "payments to cease after 20 years" certificate, and as Bolin had fully

[9] Schmidt *v.* Foresters, 228 Mo. 675, 686.

[10] Kern *v.* Legion of Honor, 167 Mo. 471, 479, 484. Schmidt *v.* Foresters, *supra;* Mathews *v.* Modern Woodmen, 236 Mo. 326; Brassfield *v.* Maccabees, 92 Mo. App. 102; Gruell *v.* Knights and Ladies, 129 Mo. App. 496.

[11] In Kern *v.* Legion of Honor, *supra*, the court said, p. 485: "The contention that the plaintiff as husband could not be the beneficiary under the laws of Massachusetts or under its charter and by-laws, is not open to discussion or adjudication. No such issue was raised in the pleadings or asserted upon the trial in the circuit court. . . . The defendant chose its grounds of defense, none others are open in this court."

[12] Barber *v.* Hartford Life Ins. Co., 269 Mo. 21; reversed Hartford Life Insurance Co. *v.* Barber, 245 U. S. 146; see, also, Johnson *v.* Hartford Life Insurance Co., 166 Mo. App. 261.

[13] Hartford Life Insurance Company *v.* Ibs, 237 U. S. 662; Hartford Life Insurance Co. *v.* Barber, 245 U. S. 146; Royal Arcanum *v.* Green, 237 U. S. 531; Modern Woodmen *v.* Mixer, 267 U. S. 544.

performed on his part by paying all dues and assessments over the named period, the petitioner was estopped to plead its lack of power to issue such a certificate. This again was on the theory that whatever might be the nature of the petitioner's organization in Nebraska, for the purposes of this action it must be treated as an old line insurance company in Missouri. It was further held that no question of estoppel was decided in the *Trapp* case.

As to the first of these positions, it need only be said that the *Trapp* case was a class suit in which it was determined that the petitioner lacked power, under the law of Nebraska, to issue such certificates. In such a suit the association represents all its members and stands in judgment for them, and even though the suit had a different object than the instant one it is conclusive upon all the members of the association with respect to all rights, questions, or facts therein determined.[14]

With respect to the second position, it appears from the record that Trapp, in the suit in Nebraska, pleaded that the association was estopped to deny its power to issue the form of certificate in question and the opinion of the Nebraska court, by reference to a case decided on the same day, clearly indicates that the issue of estoppel was considered and determined adversely to the plaintiff.

Fourth. Under our uniform holdings the court below failed to give full faith and credit to the petitioner's charter embodied in the statutes of Nebraska as interpreted by its highest court.[15]

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[14] Hartford Life Insurance Company *v.* Ibs, *supra*, p. 673.

[15] Royal Arcanum *v.* Green, *supra*, pp. 540, 543, 546; Hartford Life Ins. Co. *v.* Ibs, *supra*, p. 669; Hartford Life Insurance Co. *v.* Barber, *supra*, p. 151; Modern Woodmen *v.* Mixer, *supra*, p. 551.